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3rd Appeal Brief, GAU 3618, Ser. No. 09/995,097

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Examiner: **Gerald Klebe**

Appellant: **Nick Bromer**

5 GAU: **3618**

Title: **DORSIFLEXION SKATE BRAKE**

Serial No.: **09/995,097**

Filed: **Nov. 27, 2001**

This paper: **September 24, 2003**

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**TABLE OF AUTHORITIES AND
EXPLANATION OF RELEVANCE**

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Commissioner for Patents
P.O. Box 1450, Alexandria, VA 22313-1450
Sir:

The Appellant submits as an attachment to the Brief the following authorities:

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- (1) Model demonstrated at the interview of May 15, 2002; and
- (2) Affidavit of September 23, 2002 (actually a declaration).

The model and affidavit are relevant to the issues for the following reason, that was set out in the original Brief that was held to be non-compliant:

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The Examiner and SPE Brian Johnson questioned the Appellant's statement at the interview of May 15, 2002, that the Model he demonstrated was constructed prior to the application filing date. Because of their apparent doubt, the Appellant submitted the Affidavit of September 23, 2002.

However, in the Advisory Action of October 7, 2002, the Examiner wrote that “the model presented at the interview clearly showed features not in the application originally filed.” What these features are was not explained.

5 The Appellant has signed an affidavit, and there is no evidence against its assertions anywhere in the record. If the PTO is to take the position that the Model is a fake and the Affidavit is a fraud, then it should do so on the record; and if it is not to take that position, it must accept the Model in support of the application, as required by the MPEP because all the evidence shows that the Model was made prior to filing and therefore is relevant to the rejection.

10 With respect, in the rejection the Examiner did not consider one of the eight factors to be weighed (MPEP § 2164.01(a)), namely, the existence of a working example. A working Model, constructed prior to filing, was demonstrated at the interview, but the Advisory Action of October 7, 2002, shows it is not considered (MPEP § 2164.02). The Affidavit of September 23, 2002, supports the Model; if the Affidavit is not given weight, the PTO must explain “why it doubts the truth or accuracy of any statement in a supporting disclosure” (MPEP § 2164.04, emphasis in original).

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Respectfully submitted,

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